19-2994

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mike Campbell,

Plaintiff–Appellee

v.

Cheri Toalson Reisch,

Defendant–Appellant

On Appeal from the United States District Court for the Western District of Missouri — No. 2:18-cv-4129-BCW

BRIEF OF *AMICUS CURIAE* KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY IN SUPPORT OF PLAINTIFF–APPELLEE AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE[1]

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute is particularly committed to protecting free speech against threats arising out of the use of new technologies. The Institute represented the plaintiff in *Davison v. Randall*, in which the Fourth Circuit held that a public official violated the First Amendment when she blocked a user from a Facebook account she used in her official capacity. 912 F.3d 666 (4th Cir. 2019). The Institute also represents the plaintiffs in *Knight First Amendment Institute at Columbia University v. Trump*, in which the Second Circuit held that President Trump violated the First Amendment by blocking individuals based on viewpoint from his @realDonaldTrump Twitter account. 928 F.3d 226 (2d Cir. 2019), *reh'g en banc denied*, No. 18-1691-CV, 2020 WL 1328845 (2d Cir. Mar. 23, 2020).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to this filing.

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INTRODUCTION

Among the "vast democratic forums of the Internet," social media platforms are the "most important places . . . for the exchange of views" today. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (internal quotation marks and citation omitted). These platforms have become indispensable venues for the exchange of core political speech. *Id.* Of particular relevance to this case, public officials have harnessed the power of social media to perform an essential function of their jobs: communicating with their constituents and other members of the public about and in service of their official duties.[2] In turn, citizens have relied on official social media accounts as an avenue to "petition their elected representatives and otherwise engage them in a direct manner." *Packingham*, 137 S. Ct. at 1735; *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019) (noting the Supreme Court's emphasis on "the importance of social media for accessing information and communicating with others" (quoting *Packingham*, 137 S. Ct. at 1737)). For instance, President Trump communicates with the American people through numerous social media

[2] *See* Bradford Fitch & Kathy Goldschmidt, Cong. Mgmt. Found., *#SocialCongress 2015* 10-11 (2015), http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-social-congress-2015.pdf [https://perma.cc/HWV-BQ5G] (noting congressional staffers' agreement that social media had enabled members of Congress to have more meaningful interactions with their constituents and had made congresspersons more accountable to them).

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platforms—most famously, Twitter.[3] Every governor in the country has a Twitter account, as does every U.S. senator and the vast majority of U.S. representatives from the 116th Congress.[4]

The digital public forums created by public officials' social media accounts have grown increasingly crucial to our democracy. However, the promise of social media as a "revolution[ary]" space for civic discourse, *Packingham*, 137 S. Ct. at 1736, is threatened when public officials block individuals from their official accounts on the basis of viewpoint. This kind of censorship impedes the ability of individuals to participate freely in these forums and to receive essential information. It deprives other individuals of the opportunity to hear the speech that has been suppressed. And it insulates officials from the views of their critics.

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[3] *See* The White House, Facebook, https://www.facebook.com/WhiteHouse/ [https://perma.cc/KTD8-NLQ2]; @realDonaldTrump, Twitter, https://twitter.com/realdonaldtrump [https://perma.cc/2PHJ-LRVL]; @POTUS, Twitter, https://twitter.com/potus [https://perma.cc/39TU-S7YR]; @WhiteHouse, Twitter, https://twitter.com/WhiteHouse [https://perma.cc/JF88-CDV5]; The White House, YouTube, https://www.youtube.com/user/whitehouse [https://perma.cc/DR74-DC6C]; The White House, Instagram.com, https://www.instagram.com/whitehouse [https://perma.cc/H3GE-FXQC].

[4] *US Governors*, Twitter, https://twitter.com/TwitterGov/lists/us-governors [https://perma.cc/ALF5-WG3K] (public list produced by Twitter Government); *Members of Congress*, Twitter, https://twitter.com/cspan/lists/members-of-congress/members?lang=en [https://perma.cc/E6SN-PY64) (public list produced by CSPAN); *see also* Cong. Research Serv., *Social Media Adoption by Members of Congress: Trends and Congressional Considerations* (Oct. 9, 2018), https://fas.org/sgp/crs/misc/R45337.pdf [https://perma.cc/3FE3-FEJY].

In the last year, the Second and Fourth Circuits, as well as multiple district courts, have applied well-settled state-action and public-forum doctrines to determine whether public officials violated the First Amendment when they blocked individuals from their social media accounts. First, these courts concluded that a public official's social media account reflects "state action,"[5] and consequently is governed by the First Amendment, if the official uses the account as an extension of her office. Second, they reasoned that a public official's social media account is a "public forum" if the official has opened the account to expression by the public at large—for example, by permitting anyone to reply to or comment on the account. *See Knight*, 928 F.3d at 234–39; *Davison*, 912 F.3d at 679–88; *Windom v. Harshbarger*, 396 F. Supp. 3d 675 (N.D. W.Va. 2019); *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019). And finally, these courts have held that public officials who block critics from their official social media accounts violate the First Amendment's bedrock rule against viewpoint discrimination. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 18-1691-CV, 2020 WL 1328845, at *3 (2d Cir. Mar. 23, 2020) (statement of Parker, J.) ("As soon as municipal officials are permitted to pick and choose . . . the path is cleared for a

[5] In actions brought pursuant to Section 1983, "'under color' of law has been treated as the same thing as the 'state action' requirement under the Fourteenth Amendment." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quotation marks omitted).

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regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be." (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (1975)); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (noting that viewpoint discrimination is "an egregious form of content discrimination").

Amicus curiae respectfully urges this Court to resolve this case using the same framework used by the Second and Fourth Circuits. As explained below, cases involving public officials' blocking of individuals from their social media accounts require a "straightforward application of state action and public forum doctrines" to a new medium of communication. *Knight*, 2020 WL 1328845, at *1 (2d Cir. Mar. 23, 2020) (statement of Parker, J.). These doctrines call for fact-intensive, case-by-case analysis to determine whether a given public official's social media account reflects state action and has been opened to speech by the public. Applying these doctrines in the same manner as the Second and Fourth Circuits did would be consistent with this Court's own precedents, and would be in keeping with this Court's recognition that "the mere fact that [expression] appear[s] in a novel medium" does not place that expression beyond First Amendment protections. *See Interactive Digital Software Ass'n v. St. Louis Cty., Mo.*, 329 F.3d 954, 957 (8th Cir. 2003). Defendant–Appellant Representative Cheri Reisch ("Reisch") urges the Court to adopt a narrower and formalistic interpretation of these doctrines. *Amicus*

respectfully submits that the approach Reisch urges would disregard established precedents of this Court and the Supreme Court and compromise the integrity and vitality of online public forums that are increasingly important to our democracy.

ARGUMENT

I. The Second and Fourth Circuits Have Properly Held That Public Officials Violate the First Amendment When They Block Individuals on the Basis of Viewpoint From Social Media Accounts Used for Official Purposes.

In considering other challenges to the practice by public officials of blocking social-media critics, the Second and Fourth Circuits have relied on the same basic framework. First, to determine whether a public official's social media account reflects state action, these courts have, consistent with Supreme Court precedent, looked to how the public official actually uses the account, how she presents the account to the public, and how she, as well as other government officials and agencies, characterizes the account. Second, to determine whether a public official has established a public forum through her social media account, these courts have given significant weight to social media's inherent compatibility with expressive activity. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). They have also evaluated whether the official's "policy and past practice" toward the account evidences an intent that the forum be used for speech by the public. *Id.*

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In *Davison v. Randall*, the Fourth Circuit considered whether Phyllis Randall, Chair of the Loudoun County, Virginia, Board of Supervisors, violated the First Amendment by blocking one of her constituents, Brian Davison, from her "Chair Phyllis J. Randall" Facebook page. 912 F.3d at 672–73. Randall argued that the First Amendment did not apply to the Facebook page because she opened the account on her own, and that it was therefore a purely "personal" account. Rejecting Randall's argument that state action was absent simply because the county government did not own the Facebook page, the Fourth Circuit instead conducted a fact-intensive analysis to determine whether Randall's operation of the page was "fairly attributable to the state"—and, specifically, to determine whether the account "bore a 'sufficiently close nexus' with the State to be 'fairly treated as that of the State itself.'" *Id.* at 679–80 (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). The court noted that Randall had used the page as a "tool of governance"—that is, to provide the public with information about her and the board's activities, as well as to "solicit input" from the public on policy issues. *Davison*, 912 F.3d at 679–80. The court also observed that Randall "swathed the [page] in the trappings of her office" by, for example, including her official title on the page's header; designating her page as belonging to a "government official" in the "About" section; listing her official contact information and website on the page; and addressing many of her posts to

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county residents. *Id.* at 680–81. Considering these facts under the totality of the circumstances, the court concluded that Randall used the page as a tool of governance and, therefore, had acted under color of law. *Id.* at 681.

The Fourth Circuit next examined whether Randall's page constituted a public forum. *Id.* Drawing on well-settled public-forum precedents, the court asked whether Randall had "either by designation or long-standing custom" made the "Chair Phyllis J. Randall" Facebook page available for expressive activity, and whether the page was "compatible with such activity." *Id.* Based on Facebook's inherent compatibility with the "exchange of views" and Randall's decision to allow people to post comments on the page without restrictions, the court concluded that Randall demonstrated the requisite intent to open the comment section of her page as a public forum. *Id.* (citations omitted). The court rejected Randall's argument that public forum analysis was inapplicable because her Facebook page was part of a "private website." *Id.* at 682. Instead, the court noted that the "Supreme Court never has circumscribed forum analysis solely to government-owned property." *Id.* at 682–83 (quoting *Cornelius*, 473 U.S. at 801); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 (2010) ("[T]his Court has employed forum analysis to determine when a governmental entity, in regulating *property in its charge*, may place limitations on speech." (emphasis added)); *Se. Promotions*, 420 U.S. at 555 (holding that "a privately owned Chattanooga theater under long-

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term lease to the city" was a "public forum designed for and dedicated to expressive activities"). The court concluded that, even on private property, public forum analysis is relevant where government "retain[s] and exercise[s] significant control" over the forum, as Randall did with her Facebook page. 912 F.3d at 683. Accordingly, the court concluded that Randall's page was a public forum and that Randall violated the First Amendment by blocking one of her constituents from the page in retaliation for a critical comment. *Id.* at 687.

In *Knight First Amendment Institute v. Trump*, the Second Circuit used the same analytical framework to evaluate whether President Donald Trump's @realDonaldTrump Twitter account reflected state action, and whether the account constituted a public forum. *See Knight*, 928 F.3d at 230. Like the defendant in *Davison*, President Trump argued that his practice of blocking people from his social media account was not subject to the First Amendment because the account was personal. The Second Circuit rejected this categorical argument and instead examined the particular ways in which President Trump and his staff used the account to determine whether the president acted in a personal or governmental capacity when he blocked the plaintiffs. Looking to the visual appearance of the account, the court noted that it was registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C.'" and that the header photographs showed the president engaged in his official duties. *Id*. at 231. The court

also considered how other government officials and agencies characterized the account. It noted, for example, that the White House social media director described the account as a channel for communication with the American people; the former White House press secretary stated that President Trump's tweets should be considered "official statements" by the president; the National Archives and Records Administration informed the White House that the president's tweets are "official records that must be preserved under the Presidential Records Act"; and the official @POTUS Twitter account frequently retweeted tweets posted on the @realDonaldTrump account. *Id.* at 231–32. In addition, the court evaluated how the president managed and used the account, noting that the president routinely used the account to "communicat[e] and interact[] with the public about his administration" and make official announcements regarding major policies and government appointments, and that the president relied on White House staff and resources to post tweets and maintain the account. *Id.* at 235–36.

The Second Circuit rejected the argument that the president's act of blocking the plaintiffs was purely personal because blocking is a tool available to all of Twitter's users. *Id.* at 236. As the court explained, the president's blocking of critics had to be considered in the context of the official nature of the @realDonaldTrump account as a whole. *See id*. ("[T]he fact that any Twitter user can block another account does not mean that the President somehow becomes a private person when

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he does so."); *see also Knight*, 2020 WL 1328845, at *2 (statement of Parker, J.) (noting that "when the President blocks users, he blocks them from access to, and interaction with, an official account").

Having determined that the @realDonaldTrump account was "an important tool of governance" and thus reflected state action, the Second Circuit turned to the question of whether the account was a public forum. Finding that the president had made his Twitter account's "interactive features accessible to the public without limitation," the court concluded that the account was a public forum, and that the president violated the First Amendment by engaging in viewpoint discrimination when he blocked critics from the account. *Id.* at 237 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

In analogous cases, many district courts have applied the same state-action and public-forum precedents that the Second and Fourth Circuits applied. *See Windom*, 396 F. Supp. 3d at 685 (concluding that plaintiffs sufficiently alleged that a state legislator's Facebook page reflected state action and was a public forum); *One Wisconsin Now*, 354 F. Supp. 3d at 956 (W.D. Wis. 2019) (holding that legislators acted under color of law in creating and maintaining their Twitter accounts and those accounts were public forums); *see also Robinson v. Hunt Cty., Texas*, 921 F.3d 440, 447–50 (5th Cir. 2019) (concluding that plaintiff sufficiently pled that a Texas county violated the First Amendment by deleting her comment and

banning her from the county sheriff's Facebook page); *Leuthy v. LePage*, No. 1:17-CV-00296-JAW, 2018 WL 4134628, at *15 (D. Me. Aug. 29, 2018) (concluding that plaintiffs adequately pled that the governor violated the First Amendment by deleting their posts and banning them from his Facebook page). *But see Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (denying plaintiffs' motion for preliminary injunction in part because they failed to indicate likelihood of success on their First Amendment claim).

II. This Court Should Resolve This Case by Applying the Same Framework Used by the Second and Fourth Circuits.

This Court should resolve this social media blocking case using the same framework the Second and Fourth Circuits used. This framework involves a straightforward application of Supreme Court and Eight Circuit precedent and appropriately protects individuals' First Amendment rights to engage in public discourse in these virtual public spaces. This approach calls for a fact-intensive, case-by-case analysis that recognizes that public officials may maintain their own personal social media accounts free from constitutional scrutiny—provided they do not use them as extensions of their office.

Thus, to answer the state action question in a social media blocking case such as this, the Court should examine the totality of the circumstances surrounding the account, including, for example, whether the account is used to inform constituents of activities related to the office, promote official events, and converse with

constituents; whether the account includes markers of official status, such as references to the official's title or photographs of the official engaged in official conduct (*e.g.*, delivering official addresses, meeting with other officials, or attending official events); and how the account holder and other government officials characterize the account. *See Knight*, 928 F.3d at 236.

The claim that this framework is somehow more "expansive" than the framework called for by Eighth Circuit precedent is wrong. *See* Reisch Br. at 19. The question that the Second and Fourth Circuits ask—whether the alleged deprivation is "fairly attributable to the State"—is the same one that this Court asks, and, like the Second and Fourth Circuits, this Court answers the question by looking to specific facts. *See Neighborhood Enterps., Inc. v. City of St. Louis*, 540 F.3d 882, 885 (8th Cir. 2008 (quoting *Lugar*, 457 U.S. at 937 (1982)); *see also Ramirez-Peyro v. Holder*, 574 F.3d 893, 900–01 (8th Cir. 2009) (emphasizing that the state-action inquiry is "necessarily fact intensive" and reasoning that actions by nominally private actors constitute state action when a "sufficient nexus exists between the official's public position and the official's harmful conduct"); *Roe v. Humke*, 128 F.3d 1213 (8th Cir. 1997) (concluding that defendant was not acting under the color of state law because there lacked a "nexus between his position as a police officer" and the allegedly unconstitutional action).

The argument that this Court must confine its state action inquiry to the specific act of blocking, without considering the context in which the blocking occurred, is equally unpersuasive. Under that theory, the act of blocking did not occur under color of law because the ability to block people is not a power conferred by state law, but instead a function granted by a private company. *See* Reisch Br. at 14–18. But as both the Second and Fourth Circuits have recognized, the question of whether a challenged blocking reflects state action cannot be answered in a vacuum; it matters that an individual was blocked from an *account* that reflects state action. *See Knight*, 928 F.3d at 236 ("[T]he fact that any Twitter user can block another account does not mean that [a public official] somehow becomes a private person when he does so"); *Davison*, 912 F.3d at 680-81 (assessing the entirety of Randall's Facebook page in determining whether she acted under color of law in banning the plaintiff from the page).

Nor does this Court's precedent require the state-action inquiry to be limited to the act of blocking. *See* Reisch Br. at 15–18 (quoting *Magee v. Trs. of Hamline Univ, Minn.*, 747 F.3d 532 (8th Cir. 2014)). In *Magee*, this Court held that a plaintiff failed to adequately plead that a police officer had acted under color of law in publishing an editorial criticizing a law professor, encouraging another police officer to write a similar editorial, and urging the university to remove the law professor. 747 F.3d at 534. But the Court was clear that whether the officer acted under color

of law turned on the totality of the circumstances, including whether "the officer [was] on duty and in uniform, the motivation behind the officer's actions, whether the officer had access to the victim because of his position, and whether the officer threatened official conduct in the future." *Id.* at 535. If the rule were otherwise, then state actors could never be held liable as state actors when engaging in conduct that members of the public happen to be able to engage in, too. But the courts have never suggested that a city councilor (for example) may eject her critics from a public meeting simply because a private citizen has the right to eject her critics from a backyard barbecue.

That Twitter provides the ability to block individuals, and exercises control over the entire platform, does not change the analysis. Although Twitter has given its users the ability to block users from their accounts, it is the official's specific exercise of that authority that is at issue in this case and analogous ones. *See Davison*, 912 F.3d at 681 (noting that Randall had "complete control over the aspect of the . . . Facebook page giving rise to [the plaintiff's] challenge because, as administrator of the page, [Randall] had authority to ban Facebook profiles or pages"); *One Wisconsin Now*, 354 F. Supp. 3d at 950 (rejecting defendants' argument that the act of blocking was not state action because no Wisconsin law granted them the power to block Twitter users). If Twitter's control over a public official's account categorically precluded the presence of state action, then no social media account

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operated by a government official or entity could ever be an official one. Not even @CDCgov and @POTUS would be subject to the First Amendment requirement of viewpoint neutrality, and the government could freely block individuals from those accounts based on their criticism of government conduct or government officials. Nothing in this Court's or the Supreme Court's state action precedents supports such a result.[6]

The argument that legislators are categorically incapable of engaging in state action on their social media accounts is equally unconvincing. The fact that legislators cannot vote or serve on committees through their accounts is not dispositive, as legislators' official duties extend beyond voting and serving on committees. For instance, legislators may also be acting in their official capacities

[6] Reisch also argues that a public forum cannot exist on private property, such as Twitter's platform. But the Second and Fourth Circuits properly rejected that argument, which is inconsistent with Supreme Court precedent applying the public forum doctrine to a government-controlled space owned by a private entity. *See Se. Promotions*, 420 U.S. at 547–52; *Knight*, 928 F.3d at 235; *Davison*, 912 F.3d at 682. The Supreme Court's recent decision in *Halleck v. Manhattan Community Access Corporation*, 139 S. Ct. 1921 (2019) does not change the analysis. In that case, the Supreme Court held that a private entity's provision of a forum for speech does not, on its own, transform the entity into a state actor subject to the First Amendment. *Id.* at 1926. However, the Court noted that if a governmental actor "itself operate[d] the public access channels . . . the First Amendment might then constrain the local government's operation of the public access channels." *Id.* at 1934. This case posits exactly that scenario. *See Davison*, 912 F.3d at 685 n.6 (distinguishing *Halleck* because *Davison* addressed whether a *government official* acted under color of state law).

when they meet with constituents and other interested parties, field calls and register the views of the citizens they serve, inform the public about votes, promote legislative accomplishments, and preview upcoming testimony. If a legislator meets in her district office with a group of concerned citizens or lobbyists, that action is part of her official duties. Likewise, if a legislator chooses to use a social media account to gather information, register views, and communicate with the public as a means of carrying out her public duties, those actions will support a finding of state action. *See Davison*, 912 F.3d at 681 (holding that county legislator's operation of Facebook page was state action)[7]; *One Wisconsin Now*, 354 F. Supp 3d at 953 (finding that elected legislators in the Wisconsin State Assembly engaged in state action when they blocked the plaintiff from their Twitter accounts because the legislators used the accounts to "perform actual and apparent duties as state assemblyperson[s] using the power and prestige of that office to communicate legislative matters and other issues with the public."). Rather than making its state action analysis contingent on an official's specific office, this Court should conduct

[7] While Judge Keenan's concurrence in *Davison* questioned whether individual legislators could in every instance be said to be engaging in state action through their social media accounts, she ultimately joined the majority in holding that Randall—a legislator with no unilateral power to enact legislation—engaged in state action through her Facebook page. 912 F.3d at 681.

an account-specific, "fact intensive" inquiry to determine whether an official is acting under color of law in operating the account.[8] *Ramirez-Peyro*, 574 F.3d. at 901.

This Court should similarly reject the argument that an official's social media account is rendered entirely private if the official engages in campaign speech on the same account that she also uses for official purposes. As explained above, whether the account reflects state action turns on the totality of the circumstances, including the kind of speech the public official posts on the account. The mere fact that a legislator uses a social media account to tout her accomplishments and encourage people to vote for her in the future does not automatically render state action absent—just as a city councilor's enumeration of his legislative achievements does not by itself convert an open public meeting into a private campaign rally. While in some cases an official may operate an account in a way that is akin to a campaign rally for the official's political supporters, the mere fact that the legislator engages in some campaign-related speech on the account cannot be sufficient to render the state action doctrine inapplicable. When analyzing whether a public official intended to limit her account to campaign purposes, a court again must look to the totality of the circumstances, including to whether the official took steps reflecting that

[8] The claim that any individual legislator cannot, as a matter of law, create a public forum is similarly unpersuasive. Once it is established that an official's Twitter account reflects state action, the question is whether she has opened up that account to speech by the general public. *See* Part I.

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intent—for example, using separate accounts for her campaign and official functions. *See Davison*, 912 F.3d at 673 (noting that Randall had a separate page "devoted to her campaign," which she classified as belonging to a "politician" as opposed to the "government official" designation she used for her official page).

CONCLUSION

For the reasons stated herein, *amicus* respectfully submits that the Court should join the Second and Fourth Circuits by applying well-settled state-action and public-forum doctrines to Reisch's blocking of Plaintiff Mike Campbell from her Twitter account.

Dated: March 27, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,556 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

In accordance with Local Rule 28A(h)(2), I hereby certify that the electronic version of the foregoing brief has been scanned for viruses and the brief is virus-free.

Dated: March 27, 2020

/s/ *Katie Fallow*
Katie Fallow

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I, Katie Fallow, certify that on March 27, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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